CLERK'S COPY.

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1929

No. 66

THE UNITED STATES OF AMERICA, APPELLANT

vs.

HARRY M. WURZBACH

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TEXAS

FILED APRIL 18, 1929

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1929

No. 66

THE UNITED STATES OF AMERICA, APPELLANT

vs.

HARRY M. WURZBACH

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TEXAS

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1 [Caption omitted.]

2 In United States District Court, Western District of Texas, Waco Division

February term, 1929

Presentment

Filed Feb. 27, 1929; filed at San Antonio Division Mar. 1, 1929

Now, on this the 27th day of February, A. D. 1929, came into open court the grand jury heretofore empaneled, and the roll being called, and a quorum thereof being present, they, through their foreman, A. C. Patton, presented to the court the following indictment: No. 2420. The United States *vs.* Harry M. Wurzbach, an indictment for receiving contributions for political purposes from United States employees and being concerned in receiving such contributions, which was received by the court and ordered to be filed and docketed.

[File indorsement omitted.]

3 In United States District Court at Waco

Indictment

Filed Feb. 27, 1929; filed at San Antonio Division Mar. 1, 1929

In the name and by the authority of the United States of America comes our grand jury of the United States of America and the Western District of Texas, and the Waco Division thereof, and being first duly selected, tried, empanelled, sworn, and charged, upon their oaths in open court do present:

That heretofore, to wit, on or about the 28th day of June, A. D. 1926, in the counties of Guadalupe and Bexar, the exact county being to your grand jurors unknown, in the State of Texas, Western District of Texas, and San Antonio Division thereof, and within the jurisdiction of this court, one Harry M. Wurzbach, being then and there a Representative in Congress of the United States of America from the fourteenth congressional district of Texas, did then and there unlawfully, knowingly, and feloniously receive from one H. M. Holden, the said H. M. Holden then and there being an officer of the United States, to wit, a duly appointed, qualified, and acting United States attorney for the Southern District of Texas, the sum of one hundred dollars ($100.00), the said sum of one hundred dollars ($100.00) so received by the said Harry M. Wurzbach, as aforesaid, being then and there a contribution received for a political purpose, that is, for the purpose of promoting the candidacy of the said Harry M. Wurzbach for the nomination in the Republican primaries held on the 24th day of July, 1926, for the office of Representative in Congress of the United States of America from the

fourteenth congressional district of Texas; the said Harry M. Wurzbach at the time of receiving said one hundred dollars ($100.00), as aforesaid, then and there well knew that the said H. M. Holden was an officer of the United States, as aforesaid, and the said Harry M. Wurzbach, at the time of receiving said sum of one hundred dollars ($100.00), well knew that the said sum of money was a contribution received for political purposes, as aforesaid.

4 Contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the United States of America.

Second count

And your grand jurors aforesaid, upon their oaths aforesaid, do further present:

That heretofore, to wit, on or about the 28th day of June, A. D. 1926, in the counties of Guadalupe and Bexar, the exact county being unknown to your grand jurors, in the State of Texas, Western District of Texas and San Antonio Division thereof, and within the jurisdiction of this court, one Harry M. Wurzbach, being then and there a Representative in Congress of the United States of America from the fourteenth congressional district of Texas, was then and there unlawfully, knowingly, and feloniously concerned in receiving from one H. M. Holden, the said H. M. Holden then and there being an officer of the United States, to wit, a duly appointed, qualified and acting United States attorney for the Southern District of Texas, the sum of one hundred dollars ($100.00), the said sum of one hundred dollars ($100.00), of which the said Harry M. Wurzbach was concerned in receiving as aforesaid, being then and there a contribution received for a political purpose, that is, for the purpose of promoting the candidacy of the said Harry M. Wurzbach for the nomination in the Republican primaries held on the 24th day of July, 1926, for the office of Representative in Congress of the United States of America from the fourteenth congressional district of Texas, the said Harry M. Wurzbach at the time of being concerned in the receiving of said one hundred dollars ($100.00), as aforesaid, then and there well knew that the said H. M. Holden was an officer of the United States, as aforesaid, and the said Harry M. Wurzbach, at the time of being concerned in the receiving of said sum of one hundred dollars ($100.00) well knew that said sum of money was a contribution received for political purposes, as aforesaid.

Contrary to the form of the statute in such cases made and
5 provided, and against the peace and dignity of the United States of America.

Third count

And your grand jurors aforesaid, upon their oaths aforesaid, do further present:

That heretofore, to wit, on or about the 8th day of July, A. D. 1926, in the county of Bexar, State of Texas, Western District of

Texas, San Antonio division thereof, and within the jurisdiction of this court, one Harry M. Wurzbach, being then and there a Representative in Congress of the United States of America from the fourteenth congressional district of Texas, did then and there unlawfully, knowingly, and feloniously receive from one H. F. Geyer, an employee of the United States of America, to wit, a duly appointed, qualified, and acting railway postal clerk, and being a person receiving compensation for service from money derived from the Treasury of the United States, and being an employee of the Post Office Department of the United States of America, the sum of twenty-five dollars ($25.00), the said sum of twenty-five dollars ($25.00) so received by the said Harry M. Wurzbach, as aforesaid, being then and there a contribution received for a political purpose—that is, for the purpose of promoting the candidacy of the said Harry M. Wurzbach for the nomination in the Republican primaries held on the 24th day of July, 1926, for the office of Representative in Congress of the United States of America from the fourteenth congressional district of Texas—the said Harry M. Wurzbach at the time of receiving said twenty-five dollars ($25.00), as aforesaid, then and there well knew that the said H. F. Geyer was an employee of the United States, as aforesaid, and the said Harry M. Wurzbach at the time of receiving said sum of twenty-five dollars ($25.00) well knew that said sum of money was a contribution received for political purposes, as aforesaid.

Contrary to the form of the statute in such cases made and provided and against the peace and dignity of the United States of America.

6 Fourth count

And your grand jurors aforesaid, upon their oaths aforesaid, do further present:

That heretofore, to wit, on or about the 8th day of July, A. D. 1926, in the county of Bexar, State of Texas, Western District of Texas, and San Antonio division thereof, and within the jurisdiction of this court, one Harry M. Wurzbach, being then and there a Representative in Congress of the United States of America from the fourteenth congressional district of Texas, was then and there unlawfully, knowingly, and feloniously concerned in receiving from one H. F. Geyer, the said H. F. Geyer then and there being an employee of the United States of America, to wit, a duly appointed, qualified, and acting railway postal clerk, and being a person receiving compensation for service from money derived from the Treasury of the United States, and being an employee of the Post Office Department of the United States of America, the sum of twenty-five dollars ($25.00), the said sum of twenty-five dollars ($25.00), of which the said Harry M. Wurzbach was concerned in receiving as aforesaid, being then and there a contribution received for a political purpose—that is, for the purpose of promoting the candidacy of the

said Harry M. Wurzbach for the nomination in the Republican primaries held on the 24th day of July, 1926, for the office of Representative in Congress of the United States of America from the fourteenth congressional district of Texas—the said Harry M. Wurzbach at the time of being concerned in the receiving of said twenty-five dollars ($25.00), as aforesaid, then and there well knew that the said H. F. Geyer was an employee of the United States, as aforesaid, and the said Harry M. Wurzbach at the time of being concerned in the receiving of said sum of twenty-five dollars ($25.00) well knew that said sum of money was a contribution received for political purposes, as aforesaid.

Contrary to the form of the statute in such cases made and provided and against the peace and dignity of the United States of America.

7 Fifth count

And your grand jurors aforesaid, upon their oaths aforesaid, do further present:

That heretofore, to wit, on or about the 8th day of July, A. D. 1926, in the county of Bexar, State of Texas, Western District of Texas, San Antonio Division thereof, and within the jurisdiction of this court, one Harry M. Wurzbach, being then and there a Representative in Congress of the United States of America from the fourteenth congressional district of Texas, did then and there unlawfully, knowingly, and feloniously receive from one Ernest J. Keudell, the said Ernest J. Keudell then and there being an employee of the United States of America, to wit, a duly appointed, qualified, and acting railway postal clerk, and being a person receiving compensation for service from money derived from the Treasury of the United States, and being an employee of the Post Office Department of the United States of America, the sum of fifty dollars ($50.00), the said sum of fifty dollars ($50.00) so received by the said Harry M. Wurzbach as aforesaid, being then and there a contribution received for a political purpose, that is, for the purpose of promoting the candidacy of the said Harry M. Wurzbach for the nomination in the Republican primaries held on the 24th day of July, 1926, for the office of Representative in Congress of the United States of America from the fourteenth congressional district of Texas; the said Harry M. Wurzbach at the time of receiving said fifty dollars ($50.00) as aforesaid, then and there well knew that the said Ernest J. Keudell was an employee of the United States, as aforesaid, and the said Harry M. Wurzbach, at the time of receiving said sum of fifty dollars ($50.00) well knew that said sum of money was a contribution received for political purposes, as aforesaid.

Contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the United States of America.

8

Sixth count

And you grand jurors aforesaid, upon their oaths aforesaid, do further present:

That heretofore, to wit, on or about the 8th day of July, A. D. 1926, in the county of Bexar, State of Texas, Western District of Texas and San Antonio Division thereof, and within the jurisdiction of this court, one Harry M. Wurzbach, being then and there a Representative in Congress of the United States of America from the fourteenth congressional district of Texas, was then and there unlawfully, knowingly, and feloniously concerned in receiving from one Ernest J. Keudell, the said Ernest J. Keudell then and there being an employee of the United States of America, to wit, a duly appointed, qualified, and acting railway postal clerk, and being a person receiving compensation for service from money derived from the Treasury of the United States, and being an employee of the Post Office Department of the United States of America, the sum of fifty dollars ($50.00), the said sum of fifty dollars ($50.00) of which the said Harry M. Wurzbach was concerned in receiving, as aforesaid, being then and there a contribution received for a political purpose, that is for the purpose of promoting the candidacy of the said Harry M. Wurzbach for the nomination in the Republican primaries held on the 24th day of July, 1926, for the office of Representative in Congress of the United States of America from the fourteenth congressional district of Texas; the said Harry M. Wurzbach at the time of being concerned in the receiving of said fifty dollars ($50.00), as aforesaid, then and there well knew that the said Ernest J. Keudell was an employee of the United States, as aforesaid, and the said Harry M. Wurzbach, at the time of being concerned in the receiving of said sum of fifty dollars ($50.00) well knew that said sum of money was a contribution received for political purposes, as aforesaid.

Contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the United States
9 of America.

(Signed) A. C. PATTON,
Foreman of the Grand Jury.

[File indorsement omitted.]

10 In United States District Court, Western District of Texas, Waco Division

No. 2420 Cr.

THE UNITED STATES VS. HARRY M. WURZBACH

Order fixing bond

February 27, 1929

The defendant herein not being in arrest, it is ordered by the court that instanter capias, returnable to the San Antonio division of the court, forthwith issue for said defendant.

It is further ordered that bond for the appearance of said defendant instanter before this court at San Antonio, Texas, be, and the same is hereby, fixed at the sum of two thousand five hundred ($2,500.00) dollars, which said bond may be taken and approved by any United States commissioner within the district.

In United States District Court at Waco

[Title omitted.]

Order transferring cause

Filed Mar. 1, 1929

Upon application of the United States attorney, the clerk of this court is directed to transfer the above entitled and numbered cause from Waco, within the Waco division of this district, to San Antonio, within the San Antonio division of this district, for trial.

Ordered at Waco, Texas, on this the 27th day of February, A. D. 1929.

CHARLES A. BOYNTON,
United States District Judge.

11 [Clerk's certificate to foregoing papers omitted in printing.]
[File indorsement omitted.]

12 In United States District Court for the Western District of Texas, San Antonio Division

No. 7638 Criminal

THE UNITED STATES, PLAINTIFF

vs.

HARRY M. WURZBACH, DEFENDANT

Motion to quash indictment

Filed March 13, 1929

To the Honorable DUVAL WEST, Judge of said court:

Now comes HARRY M. WURZBACH, defendant in the above entitled and numbered cause, and respectfully moves the court for a judgment quashing and setting aside counts one, two, three, four, five, and six of the indictment in said cause, being all the counts thereof, for the following reason, to wit:

Because in none of said counts of said indictment do the acts charged against the defendant constitute a violation of any law of the United States.

Wherefore defendant prays that upon a hearing of this motion judgment be entered quashing and setting aside said indictment and dismissing said cause.

(Signed) HUGH R. ROBERTSON,
W. A. WURZBACH,
C. W. ANDERSON,
Attorneys for Defendant.

[File indorsement omitted.]

I hereby acknowledge and accept service of a copy of this motion, this 13 day of March, A. D. 1929.

(Signed) JOHN D. HARTMAN,
United States Attorney.

13 In United States District Court

[Title omitted.]

Order sustaining motion to quash indictment

Filed Mar. 23, 1929

On this the 23rd day of March, A. D. 1929, came on for final hearing and determination the defendant's motion to quash the indictment in this cause upon the grounds set out in said motion, and the court, after having heard the motion, together with the arguments of counsel thereon, is of the opinion that said motion should be sustained on the grounds that the words "for any political purpose whatever," as used in section 208 of the United States Criminal Code Annoted, were not intended by Congress to include the political purpose named in the indictment, which reads as follows:

"for the purpose of promoting the candidacy of the said Harry M. Wurzbach for the nomination in the Republican primaries held on the 24th day of July, 1926, for the office of Representative in Congress of the United States of America from the fourteenth congressional district of Texas,"

and if Congress did intend that the words "for any political purpose whatever" should cover the political purpose mentioned in the indictment, then that the statute in question to that extent is probably unconstitutional, and

It is therefore ordered, adjudged, and decreed by the court that the defendant's motion to quash the indictment in this cause be, and the same is hereby, sustained and the indictment dismissed, to which ruling and order of the court the United States by its district attorney then and there in open court excepted and gave notice of appeal to the United States Supreme Court. Signed after interlineation of the word "probably."

(Signed) DUVAL WEST,
United States District Judge.

O. K. H. R. ROBERTSON,
Atty. for Defendant.

[File indorsement omitted.]

14 In United States District Court

[Title omitted.]

Opinion

Filed April 3, 1929

Hearing on demurrer to indictment

Opinion of the court:

There are six counts in the indictment for violations of sec. 208, Criminal Code, Title 18, U. S. C. A.—three for "receiving money for a political purpose" and three for "being concerned in receiving money for a political purpose." The demurrer affirms that the indictment is defective because it fails to state an offense against any law of the United States.

Omitting portions not pertinent to the inquiry raised by the demurrer, the section makes it unlawful for a Representative in Congress to receive, or be concerned in receiving, from an officer of the United States, any contribution for any political purpose whatever. The questioned portion of the indictment in substance charges that the defendant, while a Representative in Congress, received from a named officer of the Government a definite sum of money, being a contribution received by defendant for a political purpose; that is to say, for the purpose of promoting his candidacy for the nomination in the Republic primaries held on July 24th, 1926, for the office of Representative in the National Congress from the fourteenth congressional district of Texas; the defendant having knowledge of the official capacity of the officer, and at the time of receiving said money, well knew that it was contributed by said officer for the political purpose mentioned, contrary to the statute.

15 This indictment sets out the words of the statute, and likewise clearly states the political purpose for which the contribution was made. Chief Justice Taft, sitting as a circuit judge, held that an offense stated in the words of this statute is sufficient. U. S. v. Scott, 74 Fed. 210 (1895).

Political rights and political purposes are nearly related.

"'Political rights' consist in the power to participate, directly or indirectly, in the establishment or management of the Government. These political rights are fixed by the Constitution. Every citizen has the right of voting for public officers and of being elected. These are the political rights which the humblest citizen possesses." (2nd Bouvier Law Dictionary; Anthony v. Burrows, 129 Fed. 783.)

The promotion of one's candidacy for nomination for the office of Representative in Congress is an exercise by the citizen of a political right. The receipt of money in furtherance of such an object is a contribution for a political purpose.

The Texas statutes regulating the nomination of candidates of political parties through primary elections are shown in chapter 13

of Vernon's Annotated Texas Civil Statutes (1925), volume 9, title 50—Elections, chapter 13—Nominations, page 85, being embraced in articles 3100 to 3167, inclusive. Article 3100 defines "primary election" to mean an election held by the members of an organized political party to nominate candidates to be voted for at a general or special election; 3101 provides that on primary election day in 1926, and every two years thereafter, candidates for governor and for all other State offices to be chosen by the vote of the entire State, and candidates for Congress and all district offices are to be chosen, * * * to be nominated by each organized political party that cast one hundred thousand votes or more, * * * shall be nominated in primary elections by the qualified voters of
16 such party; 3102, date of primary, fourth Saturday in July, 1926, and every two years thereafter shall be general primary election day, and primary elections to nominate candidates for a general election shall be held on no other day, except * * *. The remaining articles to include No. 3167 cover regulatory provisions pertinent to the chapter subject head.

The defendant contends that the words "for any political purpose whatever" should be interpreted to refer only to the political purposes of the Federal Government. The pertinent inquiry is—

The extent and power of Congress to alter the laws of a State which prescribes times, places, and manner of holding primary nominating elections by political parties of their district candidates for Representatives.

The source of power is found in Article I, sec. 4, of the Constitution, which provides:

"The times, places and manner of holding elections for Senators and Representatives shall be prescribed in each State by the Legislatures thereof; but the Congress may at any time by law make or alter such regulations, except as to the places of choosing Senators."

Speaking generally, laws are limited in their effect to the extent of physical territory dominated and also to the authority exercised by the sovereignty proclaiming them. The States and the Nation include the same physical territory, but their fields of legislation are made distinct and separate by the Constitution.

"The rights which candidates for nomination for the office of Senator of the United States may have in a State primary nominating election come wholly from the State law; and a conspiracy to deprive them of such rights by debauching the primary with illegal votes for an opposing candidate is not within the scope of section 19 of the Penal Code (now 51, title 18, U. S. C. A.), designed for the protection of rights and privileges secured by the Constitution or laws of the United States." United States v. Gradwell, 243 U. S. 476; Newberry v. United States, 256 U. S. 232.

"The power to control party primaries for designating candidates for the Senate is not within the grant of power 'to regulate the manner of holding elections' (Art. I, sec. 4)—neither within
17 the fair intendment of the words used nor the meaning

ascribed to them by the framers of the Constitution; it is not necessary in order to effectuate the power expressly granted (Art. I, sec. 8, cl. 18); and its exercise would interfere with purely domestic affairs of the States and infringe upon liberties reserved to the people." Newberry v. United States, supra, syllabus.

The ruling in the Newberry Case brought about repeal of the particular section 8 of the then existing "Federal corrupt practices act," in which Congress had provided for a regulation of the manner in which the States should conduct their primary nominating elections, upon the ground that the offending section 8 was in excess of the constitutional grant of power, and therefore void.

These two decisions definitely hold that the State nominating election primaries are wholly under State control. It is therefore a violation of Federal law for a Representative in Congress to receive from a Federal officer a contribution of money for State political purposes as distinguished from Federal?

Three essential Federal jurisdictional elements affirmatively appear in the indictment: (1) The receipt by a then Representative in the Congress of a contribution of money; (2) from an officer of the United States; (3) for a political purpose—that is, to promote the defendant's candidacy for nomination in the State primary election for Representative in Congress. It may be assumed that the Federal Government has authority to regulate, within reasonable bounds, the conduct of Representatives in Congress and its own officials and agents as to contributions for "Federal political purposes"; but what of its authority over them for "any political purposes whatever"?

The effect of this general description of an act the doing of which is declared to be a felony is to be ascertained by applying the tests of statutory construction. The following rule is declared:

"A criminal statute should define clearly the offense which it purports to punish, and that when so defined it should be within the limits of the power of the legislative body enacting it." United States v. Reese, 92 U. S. 214; Trade-Mark Cases, 100 U. S. 82; James V. Bowman, 190 U. S. 127.

18 The court in United States v. Reese, supra, referring to the effect of a penal statute enacted by Congress which in general terms was broad enough to cover wrongful acts without as well as within the constitutional grant of power, said:

"It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders and leave it to the courts to step inside and say who could be rightfully detained and who should be set at large. This would, to some extent, substitute the judicial for the legislative department of the Government. * * * To limit this statute in the manner now asked for would be to make a new law, not to enforce an old one. This is no part of our duty."

In the Trade-mark Cases, supra, the validity of the law to punish counterfeiting of trade-marks was questioned by demurrer to the indictment. The acts exercised a general control of trade-marks,

and the indictment stated the offense in general terms. The court held that the grant of power by the Constitution to Congress to control trade-marks was not general, but limited. It was suggested to the court that, since Congress was granted power to regulate trade-marks used in commerce with foreign nations and among the States, those statutes should be held valid as limited to that class of cases.

The court held:

"While it may be true that when one part of a statute is valid and constitutional, and another part is unconstitutional and void, the court may enforce the valid part where they are distinctly separable, so that each can stand alone, it is not within the judicial province to give to the words used by Congress a narrower meaning than they are manifestly intended to bear in order that crimes may be punished which are not described in language that brings them within the constitutional power of that body."

The cases cited and principles declared are convincing that the otherwise well-understood words "for any political purpose whatever" are ambiguous and uncertain in meaning as used in this statute. The act in question is highly penal, and because of ambiguity and uncertainty the rule of strict construction should be applied.

"In construing a penal statute all reasonable doubts concerning its meaning should operate in favor of the respondent. Where penalties are to be recovered, the proof must bring the transaction within both letter and spirit of the law, and usually show the plain breach of both." Harrison v. Vose, 9 Howard, 372.

19 Following the principles announced in the cases quoted, it is plain that the statute fails to clearly define the offense which it seeks to punish; nor do the objects and purposes of the act definitely appear to be within the limits of the enacting power of Congress.

The constitutional grant of power limited control of trade-marks to those used in commerce between foreign nations and among the States and Indian tribes. The major questions involved in the Trade-Mark Cases, supra, are found in the case at bar. There Congress had passed an act embracing control over all commerce, including that between citizens of the same State, and, further, declaring the counterfeiting of any trade-mark to be a criminal offense. The question before the court raised by general demurrers to indictments was whether Congress had the power to pass a general act when its power had been definitely limited. Here the act is infinite in extent. It affects "any political purpose whatever." The indictment specifies a particular political purpose which refers to a field of jurisdiction outside the power of Congress and in excess of the constitutional grant. The citation is a case in point by ruling authority. Following the words of the Great Court, this court "cannot give a narrower meaning to the words used by Congress than they are manifestly intended to bear in order that crimes may be punished which are not described in language that brings them within the constitutional power of that body," because the power attempted to be exercised by the Congress exceeds the power granted by the Constitution.

The like principle is declared in the Newberry Case, supra. There the questioned statute was held to be void as in excess of its constitutional grant of power. It is to be remembered that in this case the court held that the State nominating primary election was purely a State affair, and not the subject of regulation by Congress, because in excess of the constitutional grant of power.

20 From the foregoing premises the following conclusions result:

That the act in question being penal in character and uncertain and doubtful meaning, such doubts will be construed to the benefit of defendant.

That the political purpose specified in the indictment for which defendant is charged to have received is for a State political purpose and not a Federal one.

That section 208, Criminal Code, title 18, U. S. C. A., is expressed in general terms that embrace contributions for political purposes within the field of legislative authority, as well as outside thereof, and to the latter extent is probably unconstitutional.

The court therefore rules that the indictment is insufficient as a matter of law, and the demurrer urged thereto should be and is sustained. An order to this effect is already entered.

(Signed) DuVal West,
United States District Judge.

April 3rd, 1929.

[File indorsement omitted.]

21 In United States District Court

[Title omitted.]

Petition for appeal and order allowing same

Filed April 6, 1929

To the Honorable DuVal West,
Judge of said court.

Comes now the United States of America, by John D. Hartman, United States attorney in and for the Western District of Texas, and being aggrieved by the order of the court sustaining the motion to quash the indictment in the above entitled and numbered cause, said order having been entered on the 23rd day of March, A. D. 1929, and petitions this honorable court for an order allowing the United States of America to prosecute its appeal to the honorable Supreme Court of the United States, according to the laws of the United States in that behalf provided, for which your petitioner will ever pray.

(Signed) John D. Hartman,
United States Attorney for the Western District of Texas.

It is ordered that an appeal as prayed for in the above petition be and the same is hereby allowed the United States to have reviewed in the Supreme Court of the United States the judgment heretofore entered herein sustaining the motion to quash the indictment, and it is further ordered that the United States be allowed thirty days from this date within which to file a transcript of the record with the clerk of the United States Supreme Court.

Ordered at San Antonio, Texas, on this the 4th day of April, A. D. 1929.

(Signed) DuVal West,
United States District Judge.

[File indorsement omitted.]

23 In United States District Court

[Title omitted.]

Assignments of error

Filed April 6, 1929

To the Honorable Duval West,
Judge of said court:

Comes now John D. Hartman, United States attorney for the Western District of Texas, and on behalf of the United States of America files the following assignments of error in the hearing of the motion to quash the indictment in the above-entitled and numbered cause, to wit:

First assignment of error

The court erred in sustaining the defendant's motion to quash the indictment in this cause on the ground that the words "for any political purpose whatever" as used in section 208 of the United States Criminal Code Annotated were not intended by Congress to include the political purpose named in the indictment, which reads as follows:

"for the purpose of promoting the candidacy of the said Harry M. Wurzbach for the nomination in the Republican primaries held on the 24th day of July, 1926, for the office of Representative in Congress of the United States of America from the fourteenth congressional district of Texas."

Second assignment of error

The court erred in sustaining the defendant's motion to quash the indictment in this cause on the ground that if the words "for any political purpose whatever" as used in section 208 of the United States Criminal Code Annotated were intended by Congress to cover

the political purpose described in the indictment which reads as follows:

"for the purpose of promoting the candidacy of the said Harry M. Wurzbach for the nomination in the Republican primaries held on the 24th day of July, 1926, for the office of Representative in
24 Congress of the United States of America from the fourteenth congressional district of Texas,"

then that the statute in question to that extent is probably unconstitutional.

Third assignment of error

The court erred in sustaining the defendant's motion to quash the indictment on the ground that the indictment does not charge the defendant with a violation of any law of the United States.

(Signed) JOHN D. HARTMAN,
United States Attorney for the Western District of Texas.

[File indorsement omitted.]

25–26 [Citation in usual form showing service on Hugh R. Robertson, filed April 6, 1929, omitted in printing.]

27 In United States District Court

[Title omitted.]

Præcipe for transcript of record

Filed April 6, 1929

To the Honorable D. H. HART,
U. S. District Clerk for the Western District of Texas.

An appeal having been allowed and ordered and in all things approved and in accordance with law in the above entitled and numbered cause, comes now the United States of America, by John D. Hartman, United States attorney for the Western District of Texas, and makes application for and requests that the transcript of record in this case on appeal include the following papers and documents, to wit:

1. Caption.
1a. Presentment.
2. Indictment.
3. Order transferring indictment.
4. Motion to quash the indictment.
5. Judgment of the court on the motion to quash the indictment.
6. Opinion of the court.
7. Assignments of error.
8. Petition for appeal.
9. Order allowing appeal, the citation, service, and return on appeal.

10. Order allowing thirty days in which to file transcript of record in the Supreme Court.

11. Præcipe for transcript.

(Signed) JOHN D. HARTMAN,
United States Attorney.

I hereby acknowledge receipt of copy of the above præcipe this 6th day of April, A. D. 1929.

(Signed) HUGH R. ROBERTSON,
Attorney of Record for Harry M. Wurzbach.

[File indorsement omitted.]

28 [Clerk's certificate to foregoing transcript omitted in printing.]

29 In Supreme Court of the United States

Statement of points upon which appellant relies and parts of record to be printed

Filed May 22, 1929

Statement

I

Pursuant to rule 13 of this court, appellant specifies the following points upon which it intends to rely in the above-entitled cause:

30 A. Section 312 of the act of February 28, 1925, c. 368, 43 Stat. 1073 (U. S. C. title 18, sec. 208), forbids a Representative in Congress from receiving or being concerned in receiving from Federal employees political contributions intended to be used for primary election purposes.

B. As so construed the statute is constitutional.

II

The entire record as filed should be printed.

WILLIAM D. MITCHELL,
Attorney General.
O. R. LUHRING,
Assistant Attorney General.
ALFRED A. WHEAT,
Special Assistant to the Attorney General.
HARRY S. RIDGELY,
Attorney.

MAY, 1929.

31 [File indorsement omitted.]

[Indorsement on cover:] File No. 34,154. W. Texas, U. S. D. C. Term No. 66. The United States of America, appellant, vs. Harry M. Wurzbach. Filed April 18th, 1929. File No. 34,154.

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Clerk

FILE COPY

No. 66

In the Supreme Court of the United States

OCTOBER TERM, 1928

UNITED STATES OF AMERICA, APPELLANT

v.

HARRY M. WURZBACH

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

STATEMENT OF JURISDICTION

U. S. GOVERNMENT PRINTING OFFICE: 1929

In the Supreme Court of the United States

OCTOBER TERM, 1928

No. 845

UNITED STATES OF AMERICA, APPELLANT

v.

HARRY M. WURZBACH

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

STATEMENT OF JURISDICTION

In compliance with Rule 12 of this Court, appellant submits herewith its statement showing the basis of this Court's jurisdiction in the above-entitled cause:

A

STATUTORY PROVISIONS

The statutory jurisdiction of this Court to review by direct appeal the judgment here complained of is conferred by the Act of March 2, 1907, c. 2564, 34 Stat. 1246 (U. S. C., Title 18, Sec. 682), otherwise known as the Criminal Appeals Act.

B

DATES OF JUDGMENT AND APPLICATION FOR APPEAL

The judgment to be reviewed was entered on March 23, 1929. (R. 13.) The application for appeal was made on April 4, 1929, and allowed on the same day. (R. 21.)

53361—29

C

NATURE OF THE CASE

The indictment charged defendant as a Representative in Congress with receiving and being concerned with receiving political contributions from certain-named Federal officeholders. (R. 3.) A motion to quash the indictment was sustained on the ground that the indictment charged that the political contributions were to be used for primary-election purposes, and that the statute upon which the indictment was bedded was not intended to cover such contributions, and that if it did, the statute was for that reason probably unconstitutional. (R. 13 and 14.)

D

CASES SUSTAINING JURISDICTION

United States v. *Behrman*, 258 U. S. 280.
United States v. *Patten*, 226 U. S. 525.
United States v. *Birdsall*, 233 U. S. 223.

Respectfully submitted.

WILLIAM D. MITCHELL,
Attorney General.
O. R. LUHRING,
Assistant Attorney General.
ALFRED A. WHEAT,
Special Assistant to the Attorney General.
HARRY S. RIDGELY,
Attorney.

MAY, 1929.

○

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No. 66

In the Supreme Court of the United States

OCTOBER TERM, 1929

THE UNITED STATES OF AMERICA, APPELLANT

v.

HARRY M. WURZBACH

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TEXAS

BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

OCTOBER TERM, 1929

No. 66

THE UNITED STATES OF AMERICA, APPELLANT

v.

HARRY M. WURZBACH

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TEXAS

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the District Court (R. 8) is reported in 31 F. (2d) 774.

JURISDICTION

The judgment to be reviewed was entered on March 23, 1929. (R. 7.) Appeal to this Court was petitioned for, and allowed on April 4, 1929. (R. 12–13.) The jurisdiction of this Court rests upon the provisions of the Criminal Appeals Act of March 2, 1907, c. 2564, 34 Stat. 1246 (U. S. C.

Title 18, Sec. 682), and Section 238 of the Judicial Code, as amended by the Act of February 13, 1925.

On October 28, 1929, this Court announced that it found that probable jurisdiction had been shown.

QUESTION PRESENTED

The sole question presented is whether Section 118 of the Criminal Code as amended by Section 312 of the Corrupt Practices Act of February 28, 1925, which, among other things, forbids a Representative to receive or be concerned in receiving contributions from officers or employees of the United States for any political purpose whatever, applies to a Representative who receives such a contribution to be used only in the promotion of his candidacy in a primary election, and, if so, whether the statute is for that reason unconstitutional.

STATUTE INVOLVED

Section 312 of the Corrupt Practices Act of February 28, 1925, c. 368, 43 Stat. 1053, 1073 (U. S. C. Title 18, Sec. 208), which amended in certain particulars Section 118 of the Criminal Code, reads as follows:

> It is unlawful for any Senator or Representative in, or Delegate or Resident Commissioner to, Congress, or any candidate for, or individual elected as, Senator, Representative, Delegate, or Resident Commissioner, or any officer or employee of the United States, or any person receiving any salary or compensation for services from

> money derived from the Treasury of the United States, to directly or indirectly solicit, receive, or be in any manner concerned in soliciting or receiving, any assessment, subscription, or contribution for any political purpose whatever, from any other such officer, employee, or person.

Section 118 of the Criminal Code of the United States in its original form read as follows:

> No Senator or Representative in, or Delegate or Resident Commissioner to Congress, or Senator, Representative, Delegate, or Resident Commissioner elect, or officer or employee of either House of Congress, and no executive, judicial, military, or naval officer of the United States, and no clerk or employee of any department, branch, or bureau of the executive, judicial, or military or naval service of the United States, shall, directly or indirectly, solicit or receive, or be in any manner concerned in soliciting or receiving, any assessment, subscription, or contribution for any political purpose whatever, from any officer, clerk, or employee of the United States, or any department, branch, or bureau thereof, or from any person receiving any salary or compensation from moneys derived from the Treasury of the United States.

STATEMENT

Appellee, a Representative in Congress, was indicted in the District Court of the United States for the Western District of Texas. The indictment

was in six counts and charged him with receiving and being concerned with receiving political contributions from named officers and employees of the United States, said contributions being for the purpose of promoting the candidacy of appellee in a primary election. (R. 1–5.) He thereupon filed a motion to quash the indictment on the ground that the acts charged did not constitute a violation of any law of the United States. (R. 6.) This motion was sustained (R. 7), the court saying:

> * * * the court, * * * is of the opinion that said motion should be sustained on the grounds that the words "for any political purpose whatever," as used in section 208 of the United States Criminal Code Annotated, were not intended by Congress to include the political purpose named in the indictment, which reads as follows:
>
> "for the purpose of promoting the candidacy of the said Harry M. Wurzbach for the nomination in the Republican primaries held on the 24th day of July, 1926, for the office of Representative in Congress of the United States of America from the fourteenth congressional district of Texas."
>
> and if Congress did intend that the words "for any political purpose whatever" should cover the political purpose mentioned in the indictment, then that the statute in question to that extent is probably unconstitutional,
> * * *

In its opinion, later filed (R. 8), the court stated its conclusions as follows (R. 12):

That the act in question being penal in character and uncertain and doubtful meaning, such doubts will be construed to the benefit of the defendant.

That the political purpose specified in the indictment for which defendant is charged to have received is for a State political purpose and not a Federal one.

That section 208, Criminal Code, title 18, U. S. C. A., is expressed in general terms that embrace contributions for political purposes within the field of legislative authority, as well as outside thereof, and to the latter extent is probably unconstitutional.

The court in its opinion also said that the statute was ambiguous and uncertain, but that conclusion appears to have been reached because the statute was broad enough on its face to cover political contributions for either Federal or State purposes, and the court was of the opinion that the statute, to be constitutional, should have been so framed as to show definitely that it covered only political contributions to be used for Federal purposes. It seems clear from the opinion that no ambiguity or uncertainty in the statute would have been found had the court been convinced that the power of Congress to enact the statute was broad enough to prohibit the giving and receiving of political contributions as referred to in the statute, regardless of whether such contributions were made for a Federal or State political purpose.

SPECIFICATION OF ERRORS TO BE URGED

The District Court erred—

(1) In quashing the indictment.

(2) In holding that Section 312 of the Corrupt Practices Act of February 28, 1925, although broad enough to cover political contributions for either Federal or State purposes, must be construed as restricted to such contributions for Federal purposes only, because a broader construction would render it unconstitutional.

SUMMARY OF ARGUMENT

While the statute upon which the indictment is founded is a criminal statute, no rule of construction forbids giving to the language its full meaning where that construction subserves the policy and purposes of the statute.

While analogous statutes have been before the courts, no other decision has suggested that the words "political purpose" must be limited to Federal political purposes because of any supposed lack of constitutional power on the part of Congress to forbid contributions made for a State political purpose.

The purpose of the legislation here involved is "to promote efficiency and integrity in the discharge of official duties, and to maintain proper discipline in the public service." Such purpose would be just as much frustrated by the receiving of a political contribution for use in a primary election as it would be by receipt of such a contribution for use in a general election.

The decisions plainly indicate that such legislation does not rest upon the limited power over elections conferred upon Congress by the Constitution, and the cases of *Newberry* v. *United States*, 256 U. S. 232, and *United States* v. *Gradwell*, 243 U. S. 476, relied upon by the court below, are not controlling.

There is nothing in the legislative history incorporating old Section 118 of the Criminal Code in the Corrupt Practices Act of 1925 which discloses any purpose to alter the scope of the old law.

ARGUMENT

THE LANGUAGE OF THE STATUTE IS SUFFICIENTLY BROAD TO COVER POLITICAL CONTRIBUTIONS FOR USE IN PRIMARIES, AND AS SO CONSTRUED IS CONSTITUTIONAL

Unless the statute under consideration and its history disclose an intention to restrict the scope of the words "for any political purpose whatever," the words must be accorded their ordinary meaning. It is true that the statute is a criminal one, but, as said by this Court in *Donnelley* v. *United States*, 276 U. S. 505, 512:

> The rule that penal statutes are to be strictly construed in favor of persons accused is not violated by allowing the language to have its full meaning where that construction is in harmony with the context and supports the policy and purposes of the enactment. *United States* v. *Hartwell*, 6 Wall. 385, 395. *United States* v. *Wiltberger*, 5 Wheat. 76, 95.

See also *United States* v. *Alford,* 274 U. S. 264, 267.

The words "for any political purpose whatever" have been in the statute since the original Act of January 16, 1883, c. 27, Sec. 11, 22 Stat. 403, 406. Similar language has been used in other Acts, and up to the time of the decision below no court had suggested that there was any political purpose which it did not cover.

United States v. *Curtis,* 12 Fed. 824, 106 U. S. 371, arose under the Act of August 15 1876, c. 287, Sec. 6, 19 Stat. 143, 169 (U. S. C., Title 18, Sec. 213), which forbade one officer from requesting, giving to, or receiving from any other officer any money, property, or other thing of value "for political purposes." The indictment merely charged that the contribution was received "for the use of the Republican state committee." It was argued in the trial court that the statute was invalid because not limited to political contributions for *Federal political purposes,* and also that the indictment alleged no such *Federal purpose.* On motion for new trial and arrest of judgment the Circuit Court said (pp. 838–839):

> It is insisted for the defendant that it is not within the constitutional power of congress to make the giving or requesting or receiving of a voluntary contribution for political purposes by a subordinate government official a criminal offence. It will be observed, however, that the prohibition applies only when there is concerted action between

officials in this behalf. The question, then, is whether it is competent for congress to prohibit co-operation between officials in the raising of funds for political purposes. Undoubtedly, it is lawful for congress to prescribe all needful regulations for the discipline of government officials, and to declare what infractions of discipline shall be treated as criminal offences. The power to prohibit acts of officers or employes which are incompatible with the proper discharge of their duties, or which impair the efficiency or tend to demoralize the public service, is essential to promote the end and object of government; and this power resides in the legislative department of the government. In executing this power congress must of necessity exercise its judgment and discretion in determining what acts are or are not of such a pernicious character and tendency. This legislative discretion embraces a large field, and its boundaries can not always be readily located. It is only when congress has palpably transgressed the limits of its discretion that the judicial departments will intervene. Such a case might arise if congress should attempt to prohibit an act of a nature pertaining so exclusively to the sphere of private conduct that it could not, by any implication, impinge upon official deportment or official discipline. We are not able to say that the acts prohibited by the present statute are of such a character. We can not affirm that congress transcended its discretion in prohibiting

> transactions between officials which create the relation of donor and donee, and introduce party interests into the public service; nor that congress erred in assuming that the influences springing from this relation and these interests should be discouraged as liable to deflect the independence and impartiality which must rule official intercourse. * * * It is sufficient to justify the exercise of the legislative discretion if the prohibited acts tend to introduce interests which disturb the just equipose of official relations.

Curtis thereupon sought a writ of habeas corpus from this Court, but it was refused. In disposing of the case this Court said (106 U. S. pp. 371–374):

> The act is not one to prohibit all contributions of money or property by the designated officers and employes of the United States for political purposes. Neither does it prohibit them altogether from receiving or soliciting money or property for such purposes. It simply forbids their receiving from or giving to each other. Beyond this no restrictions are placed on any of their political privileges.
>
> That the government of the United States is one of delegated powers only, and that its authority is defined and limited by the Constitution, are no longer open questions; but express authority is given Congress by the Constitution to make all laws necessary and proper to carry into effect the powers that are delegated. Art. 1, sect. 8. Within the

legitimate scope of this grant Congress is permitted to determine for itself what is necessary and what is proper.

The act now in question is one regulating in some particulars the conduct of certain officers and employes of the United States. It rests on the same principle as that originally passed in 1789 at the first session of the first Congress, which makes it unlawful for certain officers of the Treasury Department to engage in the business of trade or commerce, or to own a sea vessel, or to purchase public lands or other public property, or to be concerned in the purchase or disposal of the public securities of a State, or of the United States (Rev. Stat., sect. 243); and that passed in 1791, which makes it an offence for a clerk in the same department to carry on trade or business in the funds or debts of the States or of the United States, or in any kind of public property (id., sect. 244); and that passed in 1812, which makes it unlawful for a judge appointed under the authority of the United States to exercise the profession of counsel or attorney, or to be engaged in the practice of the law (id., sect. 713); and that passed in 1853, which prohibits every officer of the United States or person holding any place of trust or profit, or discharging any official function under or in connection with any executive department of the government of the United States, or under the Senate or House of Representatives, from acting as an agent or attorney for the prosecution of any claim against the

United States (id., sect. 5498); and that passed in 1863, prohibiting members of Congress from practising in the Court of Claims (id., sect. 1058); and that passed in 1867, punishing, by dismissal from service, an officer or employe of the government who requires or requests any workingman in a navy-yard to contribute or pay any money for political purposes (id., sect. 1546); and that passed in 1868, prohibiting members of Congress from being interested in contracts with the United States (id., sect. 3739); and another, passed in 1870, which provides that no officer, clerk, or employe in the government of the United States shall solicit contributions from other officers, clerks, or employes for a gift to those in a superior official position, and that no officials or clerical superiors shall receive any gift or present as a contribution to them from persons in government employ getting a less salary than themselves, and that no officer or clerk shall make a donation as a gift or present to any official superior (id., sect. 1784). Many others of a kindred character might be referred to, but these are enough to show what has been the practice in the Legislative Department of the government from its organization, and, so far as we know, this is the first time the constitutionality of such legislation has ever been presented for judicial determination.

The evident purpose of Congress in all this class of enactments has been to promote efficiency and integrity in the discharge of offi-

cial duties, and to maintain proper discipline in the public service. Clearly such a purpose is within the just scope of legislative power, and it is not easy to see why the act now under consideration does not come fairly within the legitimate means to such an end. It is true, as is claimed by the counsel for the petitioner, political assessments upon office-holders are not prohibited. The managers of political campaigns, not in the employ of the United States, are just as free now to call on those in office for money to be used for political purposes as ever they were, and those in office can contribute as liberally as they please, provided their payments are not made to any of the prohibited officers or employes. What we are now considering is not whether Congress has gone as far as it may, but whether that which has been done is within the constitutional limits upon its legislative discretion.

A feeling of independence under the law conduces to faithful public service, and nothing tends more to take away this feeling than a dread of dismissal. If contributions from those in public employment may be solicited by others in official authority, it is easy to see that what begins as a request may end as a demand, and that a failure to meet the demand may be treated by those having the power of removal as a breach of some supposed duty, growing out of the political relations of the parties. Contributions secured under such circumstances will quite as likely be made to avoid the consequences of the

> personal displeasure of a superior, as to promote the political views of the contributor,—to avoid a discharge from service, not to exercise a political privilege.

United States v. *Thayer,* 209 U. S. 39, arose under Section 12 of the Act of 1883, *supra,* which Act also contained, in Section 11 thereof, the provision subsequently incorporated in the Corrupt Practices Act under which the indictment in the case at bar was drawn. Section 12 forbade the receipt or solicitation in any Government office of any contribution "for any political purpose whatever." The indictment in the *Thayer case* (154 Fed. 508, 509) charged a solicitation by letter for a contribution to be used in conducting the Republican State campaign in the State of Texas, and also furthering the interests of the Republican party in the State. The only attack made upon the indictment was that the solicitation was by letter which it was contended was not within the reach of the statute. This Court held that the words of the statute must be given their full scope in order to effectuate its purpose, saying (p. 42):

> It appears to us no more open to doubt that the statute prohibits solicitation by written as well as by spoken words. It forbids all persons to solicit "in any manner whatever." The purpose is wider than that of a notice prohibiting book peddling in a building. It is not, even primarily, to save employes from interruption or annoyance in

> their business. It is to check a political abuse, which is not different in kind, whether practiced by letter or by word of mouth.

Having in mind the purpose of such legislation as is here involved, as pointed out by this Court in the *Curtis case* (*supra*), it follows that the receipt by a Representative in Congress, of contributions from a government official, to promote the Representative's candidacy *in a primary election,* as charged in the indictment at bar would frustrate that purpose, quite as much as the receipt of a political contribution to be used to promote his candidacy at a general election. Such a contribution, so received, would manifestly be "for any political purpose whatever." As was said by this Court in *Donnelley* v. *United States,* 276 U. S. 505, 518:

> The construction contended for by defendant unduly restrains the language of the clause in question, is inconsistent with the context and contrary to the purposes of the Act and the policy of Congress. It is without substantial support and can not be sustained.

Indeed, the trial court expressly found that the contribution received by the appellee was "a contribution for a political purpose." (R. 8.) The limited construction placed on the statute by the trial court is not in harmony with the intention of Congress. And the broader construction for which we contend is well within its constitutional

powers. The error in the trial court's ruling to the contrary results from its assumption that power to enact the statute is to be found only in that provision of the Constitution conferring upon Congress a limited control over elections of Senators and Representatives, viz Article I, Section 4. The decisions, *supra,* are otherwise, and the cases of *Newberry* v. *United States,* 256 U. S. 232, and *United States* v. *Gradwell,* 243 U. S. 476, relied upon by the court below, do not require a contrary holding.

The *Newberry case, supra,* arose under the Act of June 25, 1910, as amended by the Act of August 19, 1911 (statute set forth 256 U. S. 232, 243), which attempted to put a limitation upon the amount which a candidate for Senator or Representative might give or expend in procuring his nomination and election. This was an attempt to control conduct with respect to nomination and election of candidates who had no official relation with the Government. Such legislation was to be supported, if at all, by Section 4, Article I, of the Constitution, which conferred upon Congress the power to alter such regulations as the States might make regarding the *times, places,* and *manner* of holding elections for Senators and Representatives. This Court held that such provision did not cover primary elections.

The *Gradwell case, supra,* merely held that the Federal conspiracy statute, because of its history,

was not applicable to acts committed in connection with a primary election, and further that such rights as a candidate for Senator or Representative had in a primary election were derived not from the Federal Constitution but from State laws. This Court left undecided in that case the question "what power Congress would have to make regulations for nominating primaries or to alter such regulations when made by a State" (p. 488).

These two cases are clearly distinguishable from the case at bar in that they represented attempts to deal with elections as such, and therefore must rest upon the limited constitutional power of Congress over that subject, while in the case at bar the end sought is, to quote from the *Curtis case, supra,* 106 U. S. 371, 373, "to promote efficiency and integrity in the discharge of official duties, and to maintain proper discipline in the public service." This is an end, as heretofore shown, well within the constitutional power of Congress.

In its opinion herein the trial court compared political rights with political purposes, suggesting (R. 8) that participating in the establishment or management of the Government was a political right, but overlooking the fact that the purpose of the statute was not to control appellee's right *to participate in the election,* but to protect the integrity and efficiency of the Federal service by forbidding appellee from soliciting or receiving the inhibited contribution from an employee therein.

The Act is not intended to control primary elections. It is intended to prevent certain intercourse with a government official, which intercourse might reasonably tend to destroy his faithfulness or efficiency in office. The Act does not affect the primary election, or the appellee's right to participate therein. It simply forbids appellee from participating in certain acts with a paid government employee, which acts Congress has determined are against the best interest of the Government. The statute is directed at contributions for *any* political purpose, because the evil effect on the employee is presumably the same, regardless of what the political purpose may be. The Government must be held to have full power to throw such safeguards around its employees, as, in the opinion of Congress, may be necessary to promote their faithfulness and reliability. The power is thus brought directly within the provisions of Article I, Section 8 of the Constitution, as held by this Court in the *Curtis case, supra.*

In connection with an attack upon a statute forbidding a member of Congress from receiving compensation for services rendered before a department of the Government, this Court, in *Burton* v. *United States,* 202 U. S. 344, 367–368, said:

> In order to promote the efficiency of the public service and enforce integrity in the conduct of such public affairs as are committed to the several Departments, Congress, having a choice of means, may prescribe

such regulations to those ends as its wisdom may suggest, if they be not forbidden by the fundamental law. It possesses the entire legislative authority of the United States. By the provision in the Constitution that "all legislative powers herein granted shall be vested in a Congress of the United States," it is meant that Congress—keeping within the limits of its powers and observing the restrictions imposed by the Constitution—may, in its discretion, enact any statute appropriate to accomplish the objects for which the National Government was established. A statute like the one before us has direct relation to those objects, and can be executed without in any degree impinging upon the rightful authority of the Senate over its members or interfering with the discharge of the legitimate duties of a Senator. * * * Evidently the statute has for its main object to secure the integrity of executive action against undue influence upon the part of members of that branch of the Government whose favor may have much to do with the appointment to, or retention in, public position of those whose official action it is sought to control or direct. * * * There can be no reason why the Government may not, by legislation, protect each Department against such evils, indeed, against everything, from whatever source it proceeds, that tends or may tend to corruption or inefficiency in the management of public affairs. * * * If that which is enacted in the form of a statute is within the general sphere of legitimate

> legislative, as distinguished from executive and judicial, action, and not forbidden by the Constitution, it is the supreme law of the land—supreme over all in public stations as well as over all the people. "No man in this country," this court has said, "is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the Government, from the highest to the lowest, are creatures of the law, and are bound to obey it."

No argument seems necessary to demonstrate the ample basis for the action of Congress in naming, among others, a representative in Congress as one of the persons forbidden to solicit or receive contributions for political purposes from other government employees. The close connection between the government employees and Members of Congress suffices to show the possibility that the soliciting or receiving of political contributions from the employee by the Member of Congress might open the door to the precise evils which statutes of this sort are intended to prevent.

Nor is there anything in the legislative history of the Corrupt Practices Act of 1925, *supra,* indicating that, by incorporating therein Section 118 of the Criminal Code, there was any purpose to alter the previously existing scope of that section. The Bill which ultimately became the Corrupt Practices Act appears to have been prepared by Representative Cable, Chairman of the House Committee on

Election of President, Vice President, and Representatives in Congress, and that Committee, in reporting out the Bill, said (House Rep. 721, 68th Cong., 1st sess.):

> The existing law regulating corrupt practices in elections has been enacted in piecemeal fashion and consists of six separate acts of Congress passed, respectively, in 1907, 1909, 1910, 1911, 1912, and 1918. These laws are in part antiquated because of additional amendments to our Constitution. They are unconstitutional in part because of the decision of the United States Supreme Court in the Newberry case. They handicap the honest candidate through certain limitations which were enacted before the number of voters was doubled by the adoption of the nineteenth amendment. The law fails to require proper publicity of contributions made between elections, and thus huge contributions, given oftentimes with the hope of a reward or favor, are not reported. H. R. 8956 represents an attempt to make an orderly revision of the existing law, eliminate its uncertainties and unconstitutional portions, and add provisions deemed necessary to cure defects in the present statutes.

See also Cong. Rec. Vol. 65, Pt. 9, p. 9516; *id.* Pt. 10, pp. 10327–10329; *id.* Pt. 11, p. 10651; and Vol. 66, Pt. 4, p. 3662.

There is no suggestion in this legislative history of any purpose to change the previously existing scope of Section 118 of the Criminal Code, under

which, as amended, the indictment at bar was framed. In such case the rule of interpretation to be applied is that stated in *McDonald* v. *Hovey,* 110 U. S. 619, 629, viz.:

> So, upon a revision of statutes, a different interpretation is not to be given to them without some substantial change of phraseology—some change other than what may have been necessary to abbreviate the form of the law. Sedgwick on Const. Stat. 365. As said by the New York Court for the Correction of Errors, in *Taylor* v. *Delancey,* 2 Caines' Cas. 143, 150:
>
> "Where the law antecedently to the revision was settled, either by clear expressions in the statutes, or adjudications on them, the mere change of phraseology shall not be deemed or construed a change of the law, unless such phraseology evidently purports an intention in the legislature to work a change." And see *Yates' Case,* 4 Johns. 317; *Theriat* v. *Hart,* 2 Hill, 380; *Parmelee* v. *Thompson,* 7 Hill, 77; *Godell* v. *Jackson,* 20 Johns. 693; *Croswell* v. *Crane,* 7 Barb. 191. "The construction will not be changed by such alterations as are merely designed to render the provisions more precise." *Mooers* v. *Bunker,* 29 N. H. 421.

See also *Heald* v. *District of Columbia,* 254 U. S. 20, 23.

CONCLUSION

The language of the statute here involved is sufficiently broad to cover the charge laid in the indict-

ment against the defendant, and as the statute so construed is well within the constitutional power of Congress, it is respectfully submitted that the judgment below should be reversed.

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No. 66

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1929.

UNITED STATES OF AMERICA, Appellant,

vs.

HARRY M. WURZBACH, Appellee.

BRIEF FOR APPELLEE.

HUGH R. ROBERTSON,
Attorney for Appellee.

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UNITED STATES OF AMERICA, Appellant,

vs.

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BRIEF FOR APPELLEE.

STATEMENT OF CASE

This is an appeal from a judgment of the United States District Court for the Western District of Texas at San Antonio, sustaining a motion to quash an indictment returned at the Waco Division of the Court against Harry M. Wurzbach.

The indictment, according to the endorsement thereon, is for violation of Section 208 of Chapter 5, Title 18, of the United States Code (Section 312 Corrupt Practices Act, February, 1925; 43 Statutes, 1073), and contains

six counts. In Counts One, Three and Five, it is charged that during the months of June and July, 1926, appellee received contributions from H. M. Holden, a United States Attorney, in the sum of $100.00, and from H. F. Geyer and Ernest J. Keudell, railway postal clerks, $25.00 and $50.00, respectively, for "a political purpose,—that is, for the purpose of promoting the candidacy of the said Harry M. Wurzbach for the nomination in the primaries held on the 24th day of July, 1926, for the office of Representative in Congress from the 14th Congressional District of Texas". Counts Two, Four and Six are based upon the same alleged tranactions referred to in the other three Counts, and charge in the language of the statute, that appellee was "concerned in receiving" said sums of money from the persons and for the purposes mentioned in Counts One, Three and Five. (R. pp. 1-5).

On March 13, 1929, appellee filed a motion to quash the indictment on the ground that the acts charged did not constitute a violation of any law of the United States. (R. p. 6). Hearing was had on this motion on March 23, 1929, and resulted in the motion being sustained, and an order to that effect was duly entered. (R. p. 7). The reasons given by the learned trial judge for sustaining the motion to quash were, as set forth in his order, that (a) the law upon which the indictment is based, is not applicable to primary elections, and (b) if it were intended to apply to primary elections, it was, to that extent, "probably unconstitutional". (R. p. 7). The trial judge also filed a written opinion in the case, which has been reported and appears in 31 Federal (2nd Series), page 774. The opinion also appears in the transcript. (R. p. 8). In this opinion, the Court gives as an additional reason for sustaining the motion to quash, that the statute is of un-

certain and doubtful meaning and fails to clearly define the offense.

QUESTIONS PRESENTED

We think the record presents an additional question to the two stated in the brief of counsel for the Government. In addition to the question of the applicability of the law in question to the facts set forth in the indictment, and of its constitutionality, if applicable, there is presented the question of whether the law is sufficiently definite and certain to constitute a valid and enforceable penal statute.

We shall present our contentions under three propositions. First, that Section 118 of the Act of March 4, 1909, as amended by Section 312 of the Act of February 28, 1925, is not applicable to the acts charged in the indictment; second, that it is so general, uncertain and indefinite as to render it invalid; and third, that if it is applicable to primary election campaigns for party nominations, that it is beyond the power and authority of Congress and is, therefore, unconstitutional.

APPELLEE'S PROPOSITION NUMBER ONE

Section 312 of the Corrupt Practices Act of February 28, 1925, (U. S. C. Title 18, Section 208), upon which the indictment is based, is not applicable to the receiving by a candidate for Representative, of contributions from officers or employees of the United States, for the purpose of promoting his candidacy for a party nomination, in a primary election.

STATEMENT

Section 208 of the present Code was formerly Section 118 of the Act of March 4, 1909, (35 Statutes, 1110), entitled "An Act to codify, revise and amend the penal laws of the United States", and so remained until it was amended and incorporated into and made a part of the Act of February 28, 1925, known as the Federal Corrupt Practices Act. (43 Statutes, p. 1073).

Prior to its amendment, Section 118 Criminal Code Act of March 4, 1909, read as follows:

> "No Senator or Representative in, or Delegate or Resident Commissioner to Congress, or Senator, Representative, Delegate, or Resident Commissioner elect, or officer or employee of either House of Congress, and no executive, judicial, military, or naval officer of the United States, and no clerk or employee of any department, branch, or bureau of the executive, judicial, or military or naval service of the United States, shall, directly or indirectly, solicit or receive, or be in any manner concerned in soliciting or receiving, any assessment, subscription, or contribution for any political purpose whatever, from any officer, clerk or employee of the United States, or any department, branch, or bureau thereof, or from any person receiving any salary or compensation from moneys derived from the Treasury of the United States".

Section 302 of the Federal Corrupt Practices Act, 1925, reads in part as follows:

> "When used in this title—
>
> "(a) The term 'election' includes a general or special election, and, in the case of a Resident Commisioner from the Philippine Islands, an election by

the Philippine Legislature, but does not include a primary election or convention of a political party;

"(b) The term 'candidate' means an individual whose name is presented at an election for election as Senator or Representative in, or Delegate or Resident Commissioner to, the Congress of the United States, whether or not such individual is elected".

Section 312 of the Federal Corrupt Practices Act, 1925, reads as follows:

"Section 118 of the Act entitled 'An Act to codify, revise, and amend the penal laws of the United States,' approved March 4, 1909, is amended to read as follows:

"'Sec. 118. It is unlawful for any Senator or Representative in, or Delegate or Resident Commissioner to, Congress, or any candidate for, or individual elected as, Senator, Representative, Delegate, or Resident Commissioner, or any officer or employee of the United States, or any person receiving any salary or compensation for services from money derived from the Treasury of the United States, to directly or indirectly solicit, receive, or be in any manner concerned in soliciting or receiving, any assessment, subscription, or contribution for any political purpose whatever, from any other such officer, employee, or person'".

Section 318 is the repealing section, and by it all laws which relate to Federal control or authority over primary elections, are expressly repealed.

ARGUMENT

In construing a statute, the intention of the law-making body should be sought, and when ascertained, should be given controlling influence. What then was

the intention of the Congress in amending this Section and incorporating it into the Act of February 28, 1925? Our contention is that the amendment of Section 118 and its incorporation into this Act shows that the Congress intended its provisions, as amended, should be brought within the limits of the subject matter with which the act dealt, namely, the receiving, disbursing and reporting of contributions made to and received by political committees and candidates for office, for the purpose of carrying on political campaigns at general and special elections; or in other words, using the language of the learned trial judge, the intention was that the "political purpose", for which the persons mentioned in Section 312 of the Act, were forbidden to receive contributions from Federal officers or employees, should be a "Federal political purpose". Had Congress not intended to so limit the field within which old Section 118 should operate, why should it have been made a part of an Act, which by its own terms, was confined to political matters relating *solely* to general and special elections, which expressly excluded primary elections from its scope, and which expressly repealed all existing laws relating to primary elections? Section 118 of the Criminal Code could certainly have been amended without making it a part of this Act, had Congress intended to leave it as it was.

The learned counsel for the Government say, that there is nothing in the legislative history of the Corrupt Practices Act of 1925, to indicate that by incorporating in it Section 118 of the Act of March 4, 1909, there was any purpose to alter the "previously existing scope of that Section". Let us see about that. We shall refer to the "previously existing scope" of the Section presently, when we shall discover that neither Section 118 nor its ancestor,

Section 11, of the Act of January 16, 1883 (22 Statutes, 406) had ever been applied to any political purpose other than purposes connected with or relating to general elections. But for the moment, let us consider briefly the situation immediately confronting Congress at the time of the introduction and passage of the Corrupt Practices Act of February 28, 1925.

In 1910, Congress had passed a Corrupt Practices Act limiting the amounts of money which candidates for Federal offices could spend, providing for a system of accounting and for making reports which would insure publicity of campaign contributions, and other regulatory provisions governing elections. (Act June 25, 1910, 36 Statutes, 822). In 1911, a lengthy amendment to the 1910 Act had been enacted, which amendment undertook to apply the provisions of the 1910 Act and additional regulations, to campaigns in primary elections. (Act Aug. 19, 1911, 37 Statutes 25). In 1912 and 1918, other Acts had been passed containing regulatory provisions which included primary elections. (Act August 23, 1912, 37 Statutes, 360, and Act October 16, 1918, 40 Statutes, 1013). On May 2, 1921, had come the decision of this Court in the case of United States versus Newberry, in which this Court held in effect that Congress was without authority to fix the maximum sum which a candidate "may spend or advance or cause to be contributed and spent by others to procure his nomination", and that, therefore, the Corrupt Practices Act of 1910, as amended by the Act of 1911, was unconstitutional.

Such then was the situation when the Corrupt Practices Act of February 28, 1925, was introduced. Now, is there anything to indicate that Congress had the decision

in the Newberry case in mind when this Act was introduced? It is quite clear that Congress did, for we find upon referring to the Report of the House Committee on Election of President, Vice-President and Representatives in Congress, which is quoted at page 21 of appellant's brief (for which we are duly grateful) that the Newberry case is expressly mentioned as one of the reasons for the new Corrupt Practices Act.

We quote from the Report as it is given in the brief:

> "The existing law regulating corrupt practices in elections has been enacted in piece-meal fashion and consists of six separate Acts of Congress, passed, respectively, in 1907, 1909, 1910, 1911, 1912 and 1918".

In referring to an Act passed in 1909, is it not reasonable to assume that the Committee meant the Act of March 4, 1909, and particularly Section 118 of that Act, indicating that they considered this Section one of the "piece-meal" Acts regulating corrupt practices in elections, and not primarily an Act regulating the conduct of Government officers and employees?

Again referring to the Report of the Committee, we quote:

> "These laws are in part antiquated, because of additional amendments to our Constitution. They are unconstitutional in part, because of the decision of the United States Supreme Court in the Newberry case".

In what respect were those laws "unconstitutional in part"? Obviously insofar as they applied to primary elections.

And in conclusion, the Committee said:

> "H. R. 8956 represents an attempt to make an orderly revision of the existing law, eliminate its uncertainties and unconstitutional portions, and add provisions deemed necessary to cure defects in the present statutes."

And may we say here, we think it reasonable to believe that in the preparation and passage of the new Corrupt Practices Act, Congress regarded the decision of this Court in the Newberry case as definitely placing primary elections outside the field of Congressional power and authority, and little emphasis was placed upon the particular ground upon which the decision rested. The important and outstanding fact was that primary elections were held to be State affairs, and the important question as far as Congress was concerned, was that of its future purpose and policy in the preparation and enactment of measures dealing with the raising and disbursing of campaign funds. The natural and logical, and in fact the only thing to do, was to confine such measures to general and special elections, or in other words, to "Federal political purposes". We think this policy and purpose is clearly reflected in the Corrupt Practices Act of 1925. We are not now discussing the question of constitutionality, but the purpose and intent of Congress as to the "political purposes", to which said law, including Section 312, should be applied.

Let us next see how the policy and purpose stated in the Report of the Committee to revise, co-ordinate, and avoid constitutional pitfalls, was carried out in the bill which accompanied it, and which was duly enacted into law. It begins with the declaration, in Section 302, that the political subjects to be dealt with are general and

special elections and not primary elections or nominating conventions; and it concludes by repealing, in Section 318, the Corrupt Practices Act of 1910 as amended by the Act of August, 1911, and every other then existing Act by which Congress had, prior to the decision in the Newberry case, undertaken to deal with matters pertaining to primary elections. And in such a law, so conceived and so written, was incorporated Section 118 of the Act of March 4, 1909, becoming Section 312 of the Corrupt Practices Act of 1925. We confidently believe, that in making Section 118 a part of the Corrupt Practices Act, the law-making body clearly manifested the intention to limit the application of the words "for any political purpose whatever" in Section 312, to matters within the boundaries of the Acts clearly defined field of operations, namely, general and special elections. So limited and construed, the Section harmonizes with the expressed purpose and policy of the Act, falls clearly within the field of Federal jurisdiction, and is consistent with the other Sections and provisions of the Act. Not so limited, it is out of harmony with the purpose and policy of the Act, is a legislative misfit, is inconsistent with the other Sections and provisions, and in view of the nature of the amendment, is of doubtful constitutionality.

This brings us to the consideration of the words which were added to Section 118 when it was incorporated into the Corrupt Practices Act of 1925, the addition of which words further demonstrates that Section 312 was not intended to be applicable to matters connected with or relating to campaigns for party nominations. It will be noted that by the amendment there is an enlargement of the classes of persons who were formerly subject to the provisions of Section 118. We find that the words "*any*

candidate for, or individual elected as", Senator or Representative were added and now appear in Section 312. This is really the only important change in the law as it existed prior to the amendment, the other changes being principally to improve the phraseology, and in view of the fact that the words, *"any candidate for, or individual elected as"*, of course, include persons who may not be officers or employees of the United States, we think the addition of these words is conclusive evidence of the intention of Congress to apply Section 312 only to Federal political purposes. It will not be presumed, especially in view of the announced purpose of the Committee which reported the bill to avoid such an eventuality, that Congress intended to pass an unconstitutional measure, and yet counsel for the Government concede that the law would be unconstitutional if it included persons who had no official relation with the Government. Construing the Section, however, as we contend it should be construed, there would be no objection on constitutional grounds, and it would be perfectly proper to include persons who had no official relations with the Government. We think it further convincing evidence that the purpose of Congress was to limit the application of Section 312 to the matters to which every other section of the law was limited.

As further and conclusive evidence of the purpose and intent of Congress, we direct attention to subdivision (b) of Section 302 of the Corrupt Practices Act, which reads as follows:

> "The term *'Candidate'* means an individual whose name is presented *at an election for election* as Senator or Representative in, or Delegate or Resident Commissioner to, the Congress of the United States, whether or not such individual is elected".

Subdivision (a) of Section 302 reads in part as follows:

> "The term *'election'* includes a general or special election . . . . *but does not include a primary election or convention of a political party*".

It is, therefore, apparent that the word "candidate", as it is used in Section 312, does not include a candidate for a party nomination in a primary election or convention, but is expressly limited to persons who are candidates in general and special elections and, therefore, *the contributions for political purposes, forbidden by said Section, do not include contributions made to candidates for party nominations as Senators or Representatives in primary elections, whether they be candidates running for the first time, or whether they be Senators or Representatives standing for re-election.* As to the other classes of persons referred to in said section, we do not think it reasonable to believe that Congress intended that as to some, the words "any political purpose whatever", should refer to both Federal and State political purposes, and that as to others, they should be limited to Federal political purposes. We think it much more reasonable to believe that the Section was to be limited to Federal political purposes as to *all the persons* embraced within its provisions. If the original primary purpose of Section 118 was to regulate the conduct of Federal officers and employees in respect to political matters, it would appear that Congress has decided to restrict such regulations and prohibitions to matters which lie clearly within the domain of Federal jurisdiction. Even so restricted, the law may still be given a very wide application for the purposes for which money may be solicited, contributed and received by Federal officers and employees in connection with general and special

elections, are numerous and varied. The adoption of restrictive regulations with reference to primary elections, may well be left to the legislatures of the States.

There does not seem to be any reason to anticipate that any disasters or serious consequences will result from giving the law the more limited application, in view of the fact that not a single case for violation of the provisions of Section 118 has ever been brought before the courts, and since the original Act was adopted in 1883, there have been only two or three reported cases involving violations of its provisions! In view of this rather remarkable record, there is little reason to anticipate that there will be any change in the situation by giving the law the construction which we contend Congress intended it should be given.

Referring now, briefly, to the history of the law in question prior to its incorporation into the Federal Corrupt Practices Act, we assert that there is nothing in that history which would render it strange, or unusual, or unlikely, for Congress to have limited its application to Federal political purposes,—that is to say, to purposes connected with general and special elections. At the time of the enactment of the Act of January 16, 1883 (22 Statutes, 406), Section 11 of which was the legislative antecedent of Section 118 of the Criminal Code, primary elections could not, of course, have been within the view of Congress, as they were then unknown and continued unknown for many years thereafter. Since nominating primaries have become the recognized method of selecting the nominees of political parties, no court, it appears, has been called upon to determine the scope which should be given to the law in question. The few cases in which the law has come before the courts were brought before

the day of primary elections, and an inspection of the records of those cases, as they appear in the Reports, reveals that the contributions involved were made in connection with general elections. In no case, so far as we have been able to discover, has the scope of the words " for any political purpose whatever" been defined, and in no case have they been held to include purposes other than those connected with general elections.

In the case of United States vs. Curtis, 12 Fed. 824, 106 U. S. 371, decided in 1882, from which counsel quote so extensively, the indictment charged Curtis, a Federal employee, with receiving contributions from other employees for political purposes, during October, 1881, for use by "the Republican State Committee *in the then pending campaign*", which obviously referred to the general election of the year mentioned. Counsel appear to have inadvertently overlooked the words which we have italicized, in their reference to this case, and have thereby been misled into conveying the erroneous impression that the political purpose for which the contributions were made and received might have been a State political purpose. The broad contention of the defendant Curtis was that there was no constitutional warrant whatever, for imposing such restrictions and inhibitions on Federal employees, as were imposed by the law upon which the indictment was based, which was Section 6 of the Act of August 15, 1876, 19 Statutes 143,169. The opinion of the Court, as it is quoted at page 8 of the brief of appellant, states that this was the contention. The facts being as stated, and the law upon which the prosecution was based embracing only Federal employees, both the Circuit Court and this Court correctly held that the law was constitutional and that the indictment charged an

offense. The question of whether or not the Statute under consideration in the Curtis case could lawfully be applied to State political purposes as well as Federal political purposes, was not presented and was not decided by either the Circuit Court or by this Court in the Curtis case.

The only two cases in which Section 11 of the Act of January 16, 1883, seems to have been presented to the Courts for consideration, are United States vs. Riley, 74 Fed. 210 (C. C. Ky. 1895) and United States vs. Scott, 74 Fed. 213 (C.C. Ky. 1895), companion cases, in which the questions presented to the trial judge were as to whether or not the offense was properly described in the indictment, and questions as to variance between the allegations of the indictment and the evidence. The meaning and scope of "political purpose" was not presented and was not defined.

Such then was the judicial history of this law when it was made a part of the Federal Corrupt Practices Act of 1925, and we reiterate that there is nothing in it which would in any way militate against or render improbable, the intention of Congress to limit its application to the clearly defined purposes of said Act.

Concluding our argument in support of our first proposition, may we be permitted to quote part of an official circular letter written and distributed among the members of the House of Representatives, by the Clerk of the House. This letter contains a quotation from the Report of the Committee which reported the bill known as the Federal Corrupt Practices Act, 1925, and as, in the hurried preparation of this brief, this letter is the only form in which the Report is available to us, we beg leave to quote therefrom as follows:

"Wm. Tyler Page
"Clerk.

"House of Representatives
"Clerk's Office
"Washington, D. C.

"SUBJECT: CAMPAIGN RECEIPTS AND EXPENDITURES

"April 1, 1926.

"Dear Sir:

"The Federal Corrupt Practices Act, 1925, does not apply to primary elections or conventions.
"The law makes this definition—

> "'The term 'election' includes a general or special election * * * but does not include a primary election or convention of a political party'.

"The House Committee in its report on the bill which became the Federal Corrupt Practices Act, 1925, said:

> "'The limitation in the bill as to expenditures by a candidate applies only to the campaign leading up to the final election, and not to the primary campaign'.

"Inclosed is a copy of the Federal Corrupt Practices Act, 1925, also a blank form of Statement of Receipts and Expenditures of candidate for election as Representative in Congress, prepared in accordance with the provisions of said Act * * * ".

"Very truly yours,

"Wm. Tyler Page, Clerk of the House of Representatives."

We think the foregoing quotation is an additional cir-

cumstance indicative of the purpose and intention of the Congress and of the construction which it placed upon the Federal Corrupt Practices Act, 1925, including Section 312 thereof.

APPELLEE'S PROPOSITION NUMBER TWO.

The law upon which the indictment is based, Section 312, Corrupt Practices Act (Section 208, c. 5, Title 18, U. S. C.) is invalid, because of ambiguity and uncertainty and because it fails to clearly define the offense denounced therein.

AUTHORITIES.

United States vs. Brewer, 139 U. S. 278, 288.
United States vs. Lacher, 134 U. S. 624, 628.
United States vs. Armstrong, 265 Fed. 683.
McFarland vs. United States, 19 Fed. (2nd Series) 807.
United States vs. Reese, 92 U. S. 214.
Trade-Mark Cases, 100 U. S. 82.
James vs. Bowman, 190 U. S. 127.
Railway Company vs. Dey, 35 Fed. 866.
Tozer vs. United States, 52 Fed. 917.

ARGUMENT

Counsel for appellant seem to be of the opinion that the trial court did not hold that the statute was invalid because of uncertainty and ambiguity, without regard to the authority of the Congress to enact it. We think counsel are mistaken. We quote from the opinion of the Court, 31 Fed. (2nd) 774:

"The Act in question is highly penal, and, because

of ambiguity and uncertainty, the rule of strict construction should be applied. In construing a penal statute all reasonable doubts concerning its meaning should operate in favor of the respondent. Harrison v. Vose, 9 How, 372". Again: "Following the principles announced in the cases quoted, it is plain that the statute fails to clearly define the offense which it seeks to punish; nor do the objects and purposes of the act definitely appear to be within the limits of the enacting power of Congress".

And then, stating his conclusions, the Court says:

> "From the foregoing premises, the following conclusions result: That the act in question being penal in character, and uncertain and doubtful in meaning, such doubts will be construed to the benefit of defendant . . . . " (P. 777).

It will be at once observed by referring to the opinion that the third conclusion of the Court, touching the question of constitutionality, is separate and distinct from the first conclusion above quoted relating to uncertainty.

In referring to the authorities cited, we will simply quote briefly from two or three of them, the familiar tests to be applied in determining the sufficiency of a penal statute:

> "Laws which create crime ought to be so explicit that all men subject to their penalties may know what acts it is their duty to avoid. United States v. Sharp, Pet. C. C. 118. Before a man can be punished, his case must be plainly and unmistakably within the statute.
>
> United States v. Lacher, 134 U. S. 624, 628".
> United States vs. Brewer, 139 U. S. 278.
>
> "A criminal statute to be valid, must be so clearly and definitely expressed that an ordinary man can determine in advance whether his contemplated act

is within or without the law. On the other hand, it must not be so broad and elastic in its terms as to compel a man to guess at his peril whether a jury may think his act is in violation of it".

United States vs. Armstrong, 265 Fed. 683.

"No penal law can be sustained unless its mandates are so clearly expressed that any ordinary person can determine in advance what he may and what he may not do under it".

Railway Co. vs. Dey, (Justice Brewer), 35 Fed. 866.

Applying the foregoing tests to the statute in question, we contend that it is invalid because of uncertainty and ambiguity, as to (a) the persons to whom it is applicable; (b) the nature of the acts or conduct which it prohibits; and (c) the punishment to be imposed for its violation.

1. Taking these criticisms in the order in which they are stated, we consider first that of uncertainty and ambiguity as to the persons to whom the law is applicable. The ambiguity in this respect is created by the last words of Section 312 of the Corrupt Practices Act, 1925, "from any other such officer, employee, or person", considered in connection with the added words "any candidate for, or individual elected as . . . . " in the first part of the Section.

In our discussion of our first proposition, we have pointed out that it is quite clear that in amending Section 118 of the Act of March 4, 1909, the classes of persons embraced within its provisions had been increased so as to include candidates for office, persons who had been elected but who had not been seated, and persons

who had been candidates but who had been defeated. Obviously such persons would not necessarily be included in "other such officer, employee, or person". So that in spite of the clearly manifested intention to enlarge the classes of individuals to be brought within its scope, the law is rendered ambiguous and uncertain, because of the inaptness of the closing words of this Section as amended.

2. The statute does not define the acts or conduct intended to be prohibited by it, with the requisite certainty and clearness of a penal statute. The persons enumerated therein are prohibited from directly or indirectly soliciting or receiving contributions, or from being in any manner concerned in soliciting or receiving contributions, *"for any political purpose whatever"*.

When the meaning of these words is considered, we are impressed by the fact that they include practically everything touching the relationship of the individual to or with organized society. The trial Court was fully justified in saying that these words were "infinite in extent". This Court has said in United States vs. Brewer, *supra*: "Laws which create crime ought to be so explicit that all men subject to their penalties, may know what acts it is their duty to avoid". And as was well said by the trial judge in United States vs. Armstrong, *supra*: "A criminal statute to be valid, must be so clearly and definitely expressed that an ordinary man can determine in advance whether his contemplated act is within or without the law. On the other hand, it must not be so broad and elastic in its terms as to compel a man to guess at his peril whether a jury may think his act is in violation of it". Can this Court, or any court, or any man say that "all men" or the "ordinary man", subject to the pro-

visions of this law, "may know what acts", it is their or his "duty to avoid"? Even if we limit the law to the immense army of Government officers and employees, who can say what, in this day and time, those citizens may or may not do under this statute, in the exercise of their rights and privileges as citizens? As a matter of fact, there are, in our opinion, very few things left that they can do in their civic relationship with one another without violating at least the letter of this statute, and if this be true, it has no right to live as a penal enactment.

The words "for any political purpose whatever", cannot be said to have been given any definite or settled judicial construction. In the very few cases in which they have been considered by the courts, as we have already pointed out, the political purpose in question was connected with campaigns in general elections, and, therefore, the courts have not been called upon to go further than to hold that contributions for use in general election campaigns, were within their meaning. So their meaning and scope remain unexplained and undefined by this Court. Counsel for the Government in their brief, apparently concede that as to citizens, who may be in the employ of the Government, the statute is uncertain and indefinite. At page 8 of their brief, we read: "The words 'for any political purpose whatever' have been in the statute since the original Act of January 16, 1883, c. 27, Sec. 11, 22 Stat. 403, 406. Similar language has been used in other Acts, and up to the time of the decision below no court had suggested that there was *any political purpose which it did not cover*". Again, at page 18, we read: "The statute is directed at contributions for *any* political purpose, because the evil effect on the employee is presumably the same, *regardless of what the political purpose may be*". The italics are ours.

Limited, as we believe it has been limited, as we have attempted to show, the statute in question is necessary and beneficial. But if it is to be given the unlimited application contended for by counsel for the Government, (and which its language would seem to justify), it were better to permit it to resume the long sleep in which it had rested undisturbed for more than a quarter of a century until aroused, for some reason, by the District Attorney for the Western District of Texas. So construed, this law would be arbitrary and tyrannical.

What is a *political* purpose? In Words and Phrases, Volume 6, we find "political" defined as follows:

> "The word 'political' is defined by Bouvier to be pertaining to policy or the administration of government. People v. Morgan, 90 Ill. 558, 563.
>
> "The word 'Political', in its higher and true sense, means that which pertains to the government of a nation. In this sense, it includes the entire system of its laws, constitutional and statutory . . . . In re Kemp 16, Wis. 359, 396".

In Funk & Wagnalls Standard Dictionary, and the definition is substantially the same in Webster, we find the following definition:

> 1. Pertaining to public policy; concerned in the administration of Government; belonging to the enactment and administration of the laws; as political management; a political system.
>
> 2. Belonging to the science of Government; treating of policy or politics; as political principles.
>
> 3. Having an organized system of Government.
>
> 4. Pertaining to or connected with a party or

parties seeking to control Government in a State; as political methods; a political campaign.

Bearing in mind that for those mentioned in it, the statute declares that it shall be unlawful for them to *"directly or indirectly* solicit, receive, or be *in any manner concerned* in soliciting or receiving any assessment, subscription or contribution *for any political purpose whatever"*, and bearing in mind that there is no settled judicial interpretation of this statute, we respectfully submit that it is too general, uncertain and indefinite to constitute a valid penal statute.

3. The punishment to be imposed for violation of the law, as it now stands, is uncertain.

Section 312 of the Federal Corrupt Practices Act is now Section 208 of Title 18 of the United States Code, adopted June 30, 1926. The punishment for violation of Section 208 is fixed by Section 212 of the Code, same title and chapter which provides:

"Whoever shall violate any provision of Sections 208 to 211 of this title, shall be fined not more than $5,000.00, or imprisoned not more than three years, or both. (Jan. 16, 1883, c. 27, Sec. 15, 22 Stat. 407; Mar. 4, 1909, c. 321, Sec. 122, 35 Stat. 1110".

Now, when we turn to the Federal Corrupt Practices Act of 1925, we find that a different penalty was affixed for the violation of Section 312 of that Act, now Section 208 of the Code. Section 314 of the Corrupt Practices Act reads:

"Sec. 314. (a) Any person who violates any of the foregoing provisions of this title, except those for which a specific penalty is imposed by sections

312 and 313, shall be fined not more than $1,000 or imprisoned not more than one year, or both.

"(b) Any person who willfully violates any of the foregoing provisions of this title, except those for which a specific penalty is imposed by sections 312 and 313, shall be fined not more than $10,000 and imprisoned not more than two years".

As no specific penalty is imposed by Section 312 for its violation, the general penalties imposed by Section 314 would apply. These penalties, it will be noted, however, differ from the penalty imposed for violation of Section 208 of the United States Code by Section 212 of that Code, which we have quoted.

The incorporation of all of the laws of the United States into the Code did not change, or amend, or repeal any of the laws in existence at that time. Referring to the enacting clause of the Act of June 30, 1926, 44 Statutes, 1, we read:

"Sec. 2. . . . (a) The matter set forth in the Code, evidenced as hereinafter in this section provided, shall establish prima facie the laws of the United States, general and permanent in their nature, in force on the 7th day of December, 1925; but nothing in this Act shall be construed as repealing or amending any such law, or as enacting as new law any matter contained in the Code. In case of any inconsistency arising through omission or otherwise between the provisions of any section of this Code and the corresponding portion of legislation heretofore enacted effect shall be given for all purposes whatsoever to such enactments".

The thought here suggests itself that in view of the reservations contained in this enacting clause that the penalties imposed by the Federal Corrupt Practices Act would

apply, but the trouble is, at the time of the adoption of the Code, there was a law imposing a penalty for violation of Section 118, and this law has also been carried into the Code.

The penalty for violation of Section 118 of the Criminal Code, Act March 4, 1909, prior to its incorporation into the Federal Corrupt Practices Act, was fixed by Section 122 of said Code, as follows:

> "Sec. 122. Whoever shall violate any provision of the four preceding sections shall be fined not more than five thousand dollars, or imprisoned not more than three years, or both".

This Section was embraced in the Act of June 30, 1926, and now appears as Section 212, c. 5, Title 18 of that Act, which we have quoted above.

We submit that the law in question is also invalid because the punishment to be imposed for its violation is uncertain.

APPELLEE'S PROPOSITION NUMBER THREE.

If Section 312 of the Corrupt Practices Act (Sec. 208, c. 5, Title 18, U. S. C.), is applicable to the acts set forth in the indictment, it is unconstitutional because (a) Congress is not vested with authority to regulate the receipts and disbursements of candidates for party nominations in primary elections; and (b) because it is an unauthorized exercise of the discretion vested in Congress to regulate and control the political rights and privileges of officers and employes of the United States.

AUTHORITIES.

Newberry vs. United States, 256 U. S. 232.
United States vs. Gradwell, 243 U. S. 476.
Curtis vs. United States, 12 Federal 824; 106 U. S. 371.

ARGUMENT

1. If we are correct in our assertion that Section 312 of the Federal Corrupt Practices Act, 1925, includes persons other than officers and employees of the United States, then this case would be ruled by the decision of this Court in the Newberry case, *supra*, and said Section would be unconstitutional. This seems to be conceded by counsel for appellant, for in their attempt to distinguish the Newberry case from the case at bar, they say at page 16 of their brief:

> "The *Newberry case, supra*, arose under the Act of June 25, 1910, as amended by the Act of August 19, 1911 (statute set forth 256 U. S. 232, 243), which attempted to put a limitation upon the amount which a candidate for Senator or Representative might give or expend in procuring his nomination and election. *This was an attempt to control conduct with respect to nomination and election of candidates who had no official relation with the Government.* Such legislation was to be supported, if at all, by Section 4, Article I, of the Constitution, which conferred upon Congress the power to alter such regulations as the States might make regarding the *times, places,* and *manner* of holding elections for Senators and Representatives. This Court held that such provision did not cover primary elections". (Italics our own.)

In the case of United States vs. Curtis, 12 Federal 824, 106 U. S. 371, cited by counsel, the statute under consideration (Act August 15, 1876, U. S. C. Title 18, Sec-

tion 213) embraced only officers and employees of the United States and its constitutionality was upheld solely on that ground.

That Section 312 includes persons other than officers and employees of the United States, we think we have clearly shown in our argument in support of our first proposition, to which we respectfully refer the Court so as to avoid repetition here.

2. But even if Section 312 could be said to include only officers and employees of the United States, we contend that it is so general and so far-reaching as to transgress the discretion vested in the Congress to regulate and control citizens who may be officers or employees of the United States, unless it has indeed been limited, as we contend it has. We recognize that the legislative discretion covers a wide range and that the Congress may enact any laws appropriate to its exercise, but we do not believe that the law involved in this case is appropriate legislation for that purpose.

That there are limits to the lengths to which the Congress may go in imposing restrictions and prohibitions upon, and regulating and controlling the conduct of, officers and employees of the United States, is shown by the decision of the Circuit Court and of this Court in the Curtis case, *supra*, cited by counsel for appellant, and upon which they rely. We quote first from the opinion of the Circuit Court (p. 839):

> "This legislative discretion embraces a large field, and its boundaries can not always be readily located. It is only when Congress has palpably transgressed the limits of its discretion that the judicial departments will intervene. Such a case might arise if

> Congress should attempt to prohibit an act of a nature pertaining so exclusively to the sphere of private conduct that it could not, by any implication, impinge upon official deportment or official discipline. We are not able to say that the acts prohibited by the present statute are of such a character".

And in this same case, this Court said, (106 U. S. 371):

> "The act is not one to prohibit all contributions of money or property by the designated officers and employees of the United States for political purposes. Neither does it prohibit them altogether from receiving or soliciting money or property for such purposes. It simply forbids their receiving from or giving to each other. Beyond this no restrictions are placed on any of their political privileges".

And again, this Court said, (106 U. S. 373):

> "What we are now considering is not whether Congress has gone as far as it may, but whether that which has been done is within the constitutional limits upon its legislative discretion".

These citations will be sufficient to show that there are limits beyond which legislative authority may not go, even in the regulation of Government officers and employees. We believe this law, if it is to be held applicable to the financial participation of such officers and employees with one another in "any political purpose whatever", goes beyond the limits of Governmental authority.

We believe it does attempt to prohibit all contributions of money or property by the designated officers or employees of the United States for political purposes. We believe it does prohibit them altogether from receiving or soliciting money or property for such purposes. We believe it does much more than simply forbid

their receiving from or giving to each other. We believe that beyond these things, many restrictions are placed on their political privileges. Section 6 of the Act of August 15, 1876, which this Court had under consideration in the Curtis case, *supra*, was a more limited one than the statute involved in this case. It reads as follows:

> "Sec. 6. That all executive officers or employees of the United States not appointed by the President, with the advice and consent of the Senate, are prohibited from requesting, giving to, or receiving from, any other officer or employee of the government, any money or property or other thing of value for political purposes; and any such officer or employee, who shall offend against the provisions of this section shall be at once discharged from the service of the United States; and he shall also be deemed guilty of a misdemeanor, and on conviction thereof shall be fined in a sum not exceeding five hundred dollars".

It will be observed this old law embraced a much more limited class of officers or employees; that it did not include *"directly or indirectly"* requesting, giving or receiving or of being *"in any manner concerned in"* requesting, giving or receiving, nor did it include *"any political purpose whatever"*, as does the law now in question. We think these differences make the present law radically different from the one which was under consideration in the Curtis case. In the latter case, this Court said:

> "The managers of political campaigns not in the employ of the United States, are just as free now to call on those in office for money to be used for political purposes as ever they were, and those in office can contribute as liberally as they please, provided their payments are not made to any of the prohibited officers or employees". (P. 373).

This could not be said of the law now in question. The receipt by a candidate's campaign manager of contributions from Government officers and employees would undoubtedly be an indirect receiving of such contributions by the candidate, and he would certainly in that way be "concerned in" receiving them. It seems to us difficult to conceive of any way under the present law, given the broad interpretation contended for in which a candidate could accept the benefits of even voluntary contributions made by his friends who might be officers or employees of the United States. It seems to us that this is going entirely too far and beyond the legislative discretion vested in Congress.

In our argument under our second proposition, we attempted to point out the all-embracing sweep of the words "for any political purpose whatever", and we shall not here repeat what we there said in that connection. One might enumerate a long list of perfectly legitimate contributions which would fall under the ban of this statute. For example, if the President of the United States should accept an invitation to visit some city for the perfectly legitimate and proper purpose of delivering an address on the plans, purposes and policies of his administration and his party, as he recently did at Louisville, Kentucky, and it became necessary to raise sufficient funds to meet the expenses incident to renting a suitable building, radio broadcasts, and other perfectly legitimate expenses, and the postmaster or some other local official should receive voluntary contributions from other Government officials and employees in the city so honored, for the purposes mentioned, they would undoubtedly be contributing to, and the postmaster or other official would be receiving their contributions for, a political purpose prohibited by

this law. We do not consider this example at all far-fetched, and numerous other examples readily come to mind of legitimate rights and privileges, the exercise of which the Congress would have no right to deny a citizen, even though that citizen might be an officer or employee of the United States. The statute extends into the fields of education, legislation, immigration, administration of the law and other fields within which Congress could not properly regulate and control the activities of officers and employees of the United States. There is practically no limit to the lengths to which a designing or malicious district attorney might go in persecuting citizens under this statute, if it is to be held applicable to Federal, State and municipal purposes, and to *"any political purpose whatever"!*

We respectfully submit that the statute transgresses the legislative authority vested in the Congress and is, therefore, unconstitutional.

CONCLUSION.

This brief has of necessity been written hurriedly, and we realize its imperfections. We venture to express the hope, however, that we have succeeded in presenting the material issues in the case, inadequate though their presentation may be, in such a way as to be of some slight assistance to the Court in reaching its decision. We respectfully submit that the action of the Court below, in quashing the indictment, was proper, and we pray that the judgment be affirmed.

HUGH R. ROBERTSON,
Attorney for Appellee.

SUPREME COURT OF THE UNITED STATES.

No. 66.—October Term, 1929.

The United States of America, Appellant, *vs.* Harry M. Wurzbach.	Appeal from the District Court of the United States for the Western District of Texas.

[February 24, 1930.]

Mr. Justice Holmes delivered the opinion of the Court.

The respondent was indicted under the Federal Corrupt Practices Act, 1925; Act of February 28, 1925, c. 368, § 312; 43 Stat. 1053, 1073; (U. S. Code, Title 18, § 208); on charges that being a representative in Congress he received and was concerned in receiving specified sums of money from named officers and employees of the United States for the political purpose of promoting his nomination as Republican candidate for representative at certain Republican primaries. Upon motion of the defendant the District Court quashed the indictment on the ground that the statute should not be construed to include the political purpose alleged, and, construed to include it, probably would be unconstitutional. The United States appealed.

The section of the statute is as follows:

"It is unlawful for any Senator or Representative in, or Delegate or Resident Commissioner to, Congress, or any candidate for, or individual elected as, Senator, Representative, Delegate, or Resident Commissioner, or any officer or employee of the United States, or any person receiving any salary or compensation for services from money derived from the Treasury of the United States, to directly or indirectly solicit, receive, or be in any manner concerned in soliciting or receiving, any assessment, subscription, or contribution for any political purpose whatever, from any other such officer, employee, or person."

This language is perfectly intelligible and clearly embraces the acts charged. Therefore there is no warrant for seeking refined

arguments to show that the statute does not mean what it says unless there is some reasonable doubt whether so construed it would be constitutional—the doubt that was felt by the Court below.

The doubt of the District Court seems to have come from the assumption that the source of power is to be found in Article I, Section 4, of the Constitution concerning the time, place and manner of holding elections, etc.; and from the decision that the control of party primaries is purely a State affair. *Newberry* v. *United States,* 256 U. S. 232. But the power of Congress over the conduct of officers and employees of the Government no more depends upon authority over the ultimate purposes of that conduct than its power to punish a use of the mails for a fraudulent purpose is limited by its inability to punish the intended fraud. *Badders* v. *United States,* 240 U. S. 391. It hardly needs argument to show that Congress may provide that its officers and employees neither shall exercise nor be subjected to pressure for money for political purposes, upon or by others of their kind, while they retain their office or employment. If argument and illustration are needed they will be found in *Ex parte Curtis,* 106 U. S. 371, s. c. 12 Fed. 824. See *United States* v. *Thayer,* 209 U. S. 39, 42. Neither the Constitution nor the nature of the abuse to be checked requires us to confine the all embracing words of the Act to political purposes within the control of the United States.

It is argued at some length that the statute, if extended beyond the political purposes under the control of Congress, is too vague to be valid. The objection to uncertainty concerning the persons embraced need not trouble us now. There is no doubt that the words include representatives, and if there is any difficulty, which we are far from intimating, it will be time enough to consider it when raised by someone whom it concerns. The other objection is to the meaning of 'political purpose'. This would be open even if we accepted the limitations that would make the law satisfactory to the respondent's counsel. But we imagine that no one not in search of trouble would feel any. Wherever the law draws a line there will be cases very near each other on opposite sides. The precise course of the line may be uncertain, but no one can come near it without knowing that he does so, if he thinks, and if he does so it is familiar to the criminal law to make him take the risk. *Nash* v. *United States,* 229 U. S. 373.

It is said to be uncertain which of several sections imposes the penalty and therefore uncertain what the punishment is. That question can be raised when a punishment is to be applied. The elaborate argument against the constitutionality of the Act if interpreted as we read it, in accordance with its obvious meaning does not need an elaborate answer. The validity of the Act seems to us free from doubt.

Judgment reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.